

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JASON ERIC SONNTAG,

Plaintiff,

vs.

GURRES, *et al.*,

Defendants.

3: 09-cv-0637-ECR-VPC

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 (#1-1). Plaintiff has previously been granted permission to proceed *in forma pauperis* in this action. (Docket #6.) The court has screened Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A and finds that it must be dismissed in part.

I. Screening Pursuant to 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. §

1 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
2 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
3 relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se
4 pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,
5 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
6 elements: (1) that a right secured by the Constitution or laws of the United States was violated, and
7 (2) that the alleged violation was committed by a person acting under color of state law. *See West v.*
8 *Atkins*, 487 U.S. 42, 48 (1988).

9 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
10 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
11 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief
12 may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28
13 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be
14 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same
15 standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint.
16 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
17 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
18 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
19 F.3d 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
21 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
22 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
23 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
24 making this determination, the court takes as true all allegations of material fact stated in the
25 complaint, and the court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
26 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less

1 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
 2 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard under Rule
 3 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels
 4 and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic
 5 recitation of the elements of a cause of action is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S.
 6 265, 286 (1986).

7 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
 8 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
 9 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims
 10 of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful
 11 factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,
 12 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

13 **III. Screening of the Complaint**

14 Plaintiff sues defendants C.O. Gurres, C.O. Patterson, D. Carroll, C. Collier, C. O.
 15 Bengstrom, Warden James Benedetti, James Baca, N.D.O.P., NNCC, Gomez, Beng, J. Kelly,
 16 Singletary, Sturm, Furcher, Miller, Couzine, Gibson, and J. Mays in both their individual and official
 17 capacities for violation of his constitutional rights. He alleges that on October 17, 2009, he was
 18 brutally beaten in an unprovoked attack by defendants Carroll and Carroll. He alleges that other
 19 defendants either ordered or encouraged this attack, or failed to provide him with needed medical
 20 attention after the attack.

21 **A. Defendants**

22 The Civil Rights Act under which this action was filed provides:

23 Every person who, under color of [state law] . . . subjects, or causes
 24 to be subjected, any citizen of the United States. . . to the deprivation
 25 of any rights, privileges, or immunities secured by the Constitution. . .
 shall be liable to the party injured in an action at law, suit in equity, or
 other proper proceeding for redress. 42 U.S.C. § 1983.

26 The statute plainly requires that there be an actual connection or link between the actions of the

1 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department*
 2 *of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has
 3 held that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the
 4 meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts or
 5 omits to perform an act which he is legally required to do that causes the deprivation of which
 6 complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

7 The court is unable to locate any allegations in the complaint linking defendant Gomez to the
 8 claimed deprivations. According, this defendant will be dismissed.

9 The Eleventh Amendment prohibits federal courts from hearing suits brought against an
 10 unconsenting state. *Brooks v. Sulphur Springs Valley Elec. Co.*, 951 F.2d 1050, 1053 (9th Cir.
 11 1991)(citation omitted); *see also Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114, 1122 (1996);
 12 *Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Austin v. State*
 13 *Indus. Ins. Sys.*, 939 F.2d 676, 677 (9th Cir. 1991). Nevada explicitly has retained its full eleventh
 14 amendment immunity. Nev.Rev.Stat. 41.031(3). The Eleventh Amendment also bars suits against
 15 state agencies where the state itself is named as a defendant. *See Natural Resources Defense*
 16 *Council v. California Dep’t of Tranp.*, 96 F.3d 420, 421 (9th Cir. 1996); *Brook*, 951 F.2d at 1053;
 17 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)(concluding that Nevada Department of Prisons
 18 was a state agency entitled to Eleventh Amendment immunity). Accordingly, the court will dismiss
 19 the Nevada Department of Corrections and its predecessor, the Nevada Department of Prisons, from
 20 this action with prejudice.

21 **B. Count I**

22 Plaintiff alleges that on October 17, 2009, defendant Carroll instigated an attack against him
 23 in which defendant Gurres grabbed him, slammed him against the wall and handcuffed him.
 24 Plaintiff claims that defendant Collier held him while defendant Gurres repeatedly slammed his head
 25 against the wall. Plaintiff claims that defendant Gurres dragged him into the rotunda where
 26 defendant Carroll watched and laughed while defendant Gurres repeatedly beat him on the head.

1 When a prison official stands accused of using excessive physical force in violation of the
2 cruel and unusual punishment clause of the Eighth Amendment, the question turns on whether force
3 was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for
4 the purpose of causing harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (citing *Whitley v. Albers*,
5 475 U.S. 312, 320-21 (1986)). In determining whether the use of force was wanton and unnecessary,
6 it is proper to consider factors such as the need for application of force, the relationship between the
7 need and the amount of force used, the threat reasonably perceived by the responsible officials, and
8 any efforts made to temper the severity of the forceful response. *Hudson*, 503 U.S. at 7. The extent
9 of a prisoner's injury is also a factor that may suggest whether the use of force could plausibly have
10 been thought necessary in a particular situation. *Id.* Although the absence of serious injury is
11 relevant to the Eighth Amendment inquiry, it is not determinative. *Id.* That is, use of excessive
12 physical force against a prisoner may constitute cruel and unusual punishment even though the
13 prisoner does not suffer serious injury. *Id.* at 9. Although an inmate need not have suffered serious
14 injury to bring an excessive force claim against a prison official, "[not] every malevolent touch by a
15 prison guard gives rise to a federal cause of action. *Hudson*, 503 U.S. at 9. "Not every push or
16 shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's
17 constitutional rights." *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.)(*cert. denied sub*
18 *nom. Johnson*, 414 U.S. 1033 (1973)). The Eighth Amendment's prohibition on cruel and unusual
19 punishments necessarily excludes from constitutional recognition *de minimus* uses of physical force.
20 *Id.* at 9-10.

21 Prison officials have a duty to take reasonable steps to protect inmates from physical abuse.
22 *Hoptowit v. Ray*, 682 F.2d at 1250-51; *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). To establish a
23 violation of this duty, the prisoner must establish that prison officials were "deliberately indifferent
24 to a serious threat to the inmates's safety." *Farmer v. Brennan*, 511 U.S. at 834. The deliberate
25 indifference standard involves an objective and a subjective prong. First, the alleged deprivation
26 must be, in objective terms, "sufficiently serious." *Farmer v. Brennan*, 511 U.S. at 834(citing *Wilson*

1 v. *Seiter*, 501 U.S. 294, 298 (1991)). Second, the prison official must “know of and disregard an
2 excessive risk to inmate health or safety.” *Id.* at 837.

3 Supervisory personnel are generally not liable under section 1983 for the actions of their
4 employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a
5 supervisory position, the causal link between him and the claimed constitutional violation must be
6 specifically alleged. See *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*,
7 589 F.2d 438, 441 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). To show a *prima facie* case of
8 supervisory liability, plaintiff must allege facts indicating that supervisory defendants either:
9 personally participated in the alleged deprivation of constitutional rights; knew of the violations and
10 failed to act to prevent them; or promulgated or implemented a policy “so deficient that the policy
11 itself “is a repudiation of constitutional rights” and is “the moving force of the constitutional
12 violation.”” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Taylor v. List*, 880 F.2d 1040,
13 1045 (9th Cir. 1989). Although federal pleading standards are broad, some facts must be alleged to
14 support claims under Section 1983. See *Leatherman v. Tarrant County Narcotics Unit*, 113 S.Ct.
15 1160, 1163 (1993).

16 The court finds that count 1 states a colorable Eighth Amendment excessive force and failure
17 to protect claim against defendants Carroll, Gurres and Collier.

18 **C. Count II**

19 In count II, plaintiff relies on the same facts alleged in count I, adding a claim that defendant
20 Bengstrom watched with a sadistic smirk as defendant Gurres beat him. The court finds that count
21 II states a colorable Eighth Amendment failure to protect claim against defendant Bengstrom.

22 **D. Count III**

23 In count III, plaintiff alleges that defendants Singletary, May and Beng watched the beating
24 by Gurres with sadistic smiles, indicating support. The court finds that count III states a colorable
25 Eighth Amendment failure to protect claim against these defendants. Plaintiff also alleges that an
26 enraged defendant Kelly ordered precipitated the further beating of plaintiff by ordering Gurres and

1 Patterson to “take him down.” The court finds that count III states a colorable Eighth Amendment
2 failure to protect claim against defendant Kelly. The court further finds that count III states a
3 colorable Eighth Amendment excessive force claim against defendant Kelly based on supervisor
4 liability.

5 **E. Count IV**

6 In count IV, plaintiff again alleges that defendants Mays, Beng, Singletary, and Kelly
7 instigated the assault and along with defendants Beng and Bergstrom watched and approved of it.
8 The court finds that plaintiff has stated a colorable Eighth Amendment failure to protect claim
9 against each of these defendants.

10 **F. Count V**

11 In count V, plaintiff alleges that following the assault, he was placed on a motorized vehicle
12 and transported through the yard, as a display to other inmates as to what could happen. Plaintiff
13 alleges that Warden Benedetti “aprobrates” and covers up all violence, assaults, and civil and human
14 rights abuses including cases like this one. The court finds that plaintiff states a colorable Eighth
15 Amendment excessive force and failure to protect claim against Warden Benedetti based on
16 supervisory liability.

17 Plaintiff alleges that defendants Furcher and Sturm placed him in the shower for one hour,
18 subjected him to a full body search and placed him in administrative segregation. He states that he
19 has been denied most of his property and further medical help, but does not identify a defendant who
20 is responsible for this. He further alleges that defendant Miller refuses to allow him on the yard, and
21 that some defendants have been nasty to him. The court finds that these allegations do not state a
22 colorable federal claim.

23 Finally, plaintiff alleges that after he instructed the other defendants to “take him down,”
24 defendant Kelly sprayed plaintiff in the face with mace at point blank range. The court finds that this
25 allegation states a colorable Eighth Amendment excessive force claim against defendant Kelly.
26

1 **III. Conclusion**

2 This action shall go forward on the colorable Eighth Amendment claims identified
3 above.

4
5 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint.
6 (Docket #1-1.)

7 **IT IS FURTHER ORDERED** that defendant Gomez is **DISMISSED** from this action
8 without prejudice.

9 **IT IS FURTHER ORDERED** that defendants the Nevada Department of Corrections and
10 the Nevada Department of Prisons are **DISMISSED** from this action with prejudice.

11 **IT IS FURTHER ORDERED** that all of plaintiff's Constitutional claims except those
12 identified in this order as stating a colorable claim are **DISMISSED** for failure to state a claim.

13 **IT IS FURTHER ORDERED** that the Clerk shall **electronically serve a copy of this**
14 **order, along with a copy of plaintiff's complaint, to the Office of the Attorney General of the**
15 **State of Nevada, c/o Pamela Sharp, Supervising Legal Secretary, 100 North Carson St., Carson**
16 **City, Nevada 89701-4717.** The Attorney General shall advise the court within **twenty-one (21)**
17 **days** of the date of entry of this order whether they can accept service of process for the named
18 defendants and the last known address under seal of the defendants for which they cannot accept
19 service. If the Attorney General accepts service of process for any of the defendants, such
20 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**
21 of the date of the notice of acceptance of service.

22 **IT IS FURTHER ORDERED** that the parties **SHALL DETACH, COMPLETE, AND**
23 **FILE** the attached Notice of Intent to Proceed with Mediation form on or before **thirty (30) days**
24 from the date of the entry of this order.

25 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants or, if an
26 appearance has been entered by counsel, upon their attorney(s), a copy of every pleading, motion or

1 other document submitted for consideration by the court. Plaintiff shall include with the original
2 paper submitted for filing a certificate stating the date that a true and correct copy of the document
3 was mailed to the defendants or counsel for defendants. If counsel has entered a notice of
4 appearance, the plaintiff shall direct service to the individual attorney named in the notice of
5 appearance, at the address stated therein. The court may disregard any paper received by a district
6 judge or magistrate judge which has not been filed with the Clerk, and any paper received by a
7 district judge, magistrate judge or the Clerk which fails to include a certificate showing proper
8 service.

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11 DATED this 1st day of July, 2010.

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14 SENIOR UNITED STATES DISTRICT JUDGE
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Name

Prison Number (if applicable)

Address

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

_____,)
Plaintiff,)

v.)

_____)

_____)

Defendants.)

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? ____ Yes ____ No

2. If no, please state the reason(s) you do not wish to proceed with mediation? _____

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

4. List any and all cases, including the case number, that are currently pending or any pending

grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

5. Are there any other comments you would like to express to the court about whether this case is suitable for mediation. You may include a brief statement as to why you believe this case is suitable for mediation. (Attach additional pages if needed).

This form shall be filed with the Clerk of the Court on or before thirty (30) days from the date of entry of this order.

Counsel for defendants: By signing this form you are certifying to the court that you have consulted with a representative of the Nevada Department of Corrections concerning participation in mediation.

Dated this ____ day of _____, 2010.

Signature

Name of person who prepared or
helped prepare this document